

Heard Mrs. K. Deka, learned counsel for the petitioner as well as Mr. K .H. Choudhury, learned Sr. counsel assisted by Mr. Sheikh Muktar, learned counsel for the Respondent No.3. I have also heard Mr. M.R. Pathak, learned Standing Counsel, Education Department.

2. The petitioner is aggrieved by part of the order impugned herein by which, while promoting her as Head of the Department in Electronics and Telecommunication, she has been posted out of Guwahati to Jorhat, while the Respondent No.3, who has also been promoted by the said order, has been retained at Guwahati.

3. The impugned order is of 6th December, 2005 (Annexure-VI to the writ petition) by which the Lecturers/Senior Lecturers of various polytechnic institutions in different branches have been promoted as Head of the Department. The petitioner as well as the Respondent No.3 have also been promoted as Head of the Department in the Electronics and Telecommunication branch. While the petitioner has been promoted and posted as Head of the Department at Prince of Wales Institute, Jorhat from her present place of posting at Assam Engineering Institute, Guwahati, the Respondent No.3 has been promoted and posted as Head of the Department in Assam Engineering Institute, Guwahati wherein he was already serving as a Lecturer. Be it stated here that the petitioner was already holding the charge of HOD in the Institute w.e.f. 26.3.2004.

4. According to the petitioner, since she was already holding the promotional post of Head of the Department on temporary basis, she ought to have been retained at the same institute namely, the Assam Engineering Institute, Guwahati instead of sending her to another institute at Jorhat. Further contention of the petitioner is that in view of the policy of the Government to secure equality and status and of opportunity for the women of Assam in different spheres of life - economic, political and social and in area providing a wider choice to them, the respondents ought to have considered that aspect of the matter while ordering her posting to Jorhat instead of retaining her at Guwahati. Various domestic problems have also been highlighted by the petitioner. It is the further case of the petitioner that the Respondent No.3 has been favoured with the posting at Guwahati as per the ministerial interference.

5. The respondents have filed their counter affidavits denying the contentions raised in the writ petition. According to them, the impugned order of transfer and posting is by way of a routine order and they have denied any ministerial interference favouring the Respondent No.3. As regards the claim of the petitioner that she being a lady, is entitled to certain protection as per the policy decision of the State Government, the respondents have contended that such protection cannot be extended even to the extent of choice posting of the petitioner in particular place. Emphasizing the need for posting of woman officer as Head of the Department, they have contended that for better interest of student community, the petitioner should accept the posting.

6. The writ petition was entertained by order dated 22.12.2005 and it was provided that the impugned order dated 26.11.2005 would remain suspended so far as the petitioner is concerned. The interim order was further continued. By order dated 22.12.2005, it was also provided that the representation filed by the petitioner should be considered by the authority and would pass a reasoned order after hearing the writ petitioner. Mr. M.R. Pathak, learned Standing Counsel, Education Department submits that such reasoned order has already been passed. Copy of the order so passed on 7.1.2006 is available on records produced by Mr. Pathak and I have gone through the same. The order dated 7.1.2006 is quoted below :-

ORDER

In pursuance of Hon'ble High Court's order dated 22.12.05 in MA (A) No.8527/2005, the writ petitioner Smti Pallavi Choudhury has been heard by the undersigned on 05.01.06 with reference to her representation of March, 2005 requesting for not transferring her from the Assam Engineering Institute (AET), Guwahati in the event of her promotion as Head of Department. Her writ prayer petition for setting aside orders of posting her at P.O. W.I. Jorhat include the pleas (a) of her relatively higher seniority (b) her mother's illness and (c) special consideration being a woman in terms of the State policy for women, 2004 adopted by the Govt. of Assam.

In the course of hearing she also disclosed that she has brother staying outside Guwahati.

2. The undersigned has carefully examined the contention/argument advanced by Smti. Pallavi Choudhury. In the opinion of the undersigned (a) the relative higher seniority of the officials (b) the illness of parent and (c) special consideration as a woman in terms of the State policy for woman, 2004 cannot be cited as grounds to choose a place of posting on promotion as per existing Govt. instruction/policy.

3. The State policy for women, 2004 envisages inter-alia in para 3.2.2 that positive discrimination in favour of women will be resorted to wherever there be imbalance against woman or wherever it is required to meet specific needs of women in order to ensure speedy attainment of the goal. Again in the recommendation of para 4.3 of the Report of the Central Advisory Board of Education (CABE) on the girls education headed by the Hon'ble Chief Minister, Assam and constituted by the Ministry of Human Resource Development, Govt. of India says that : '4.3 - In every educational Institution there must be female teachers and female attendants without which it will be very difficult to attract girls student; woman teacher is a must but she would be provided suitable conditions to work effectively etc. etc.

In the light of this policy statements it is noted that in Assam Engineering Institute the ratio of female teachers to girls students is 1 : 3. In contrast in POWI Institute, Jorhat, the ratio of female teachers and girls students is 1 : 6.

It is incumbent on the part of the Govt. to improve the ratio in POWI Jorhat to attract and retain girls student for Technical Education.

Therefore, the transfer/posting of Smti Pallavi Choudhury at POWI Jorhat is in larger public interest.

Sd/-

Commissioner & Secy. To the Govt. of Assam,
Education (Higher) Department, Dispur.

7. During the pendency of the writ petition, the Commissioner & Secretary to the Government of Assam in the Education (Higher) (T) Department cancelled the promotion of the petitioner by notification dated 19.8.2006. Such a course of action was adopted in view of the fact that the petitioner did not join the promotional post even after enjoying the extension granted to her for doing so. This order of cancellation is under operation of stay of this Court in Misc. Case No.3381/2006. On being asked as to what is the present position regarding both the incumbents i.e. the petitioner and the Respondent No.3, it has been submitted at the bar that both of them are continuing at Guwahati in the particular institute called Assam Engineering Institute. While the Respondent No.3 has been continuing as Head of the Department, the petitioner has been continuing in her substantive grade of Lecturer. It is submitted by Mr. Pathak, learned Standing Counsel, Education Department that not only the petitioner is continuing as Lecturer, but she has been drawing her salary as such. However, it is not understood as to how this could be done in view of the fact that the impugned order, so far as the same relates to the petitioner is under operation of stay of this Court

coupled with the stay of cancellation of her promotion.

8. From the records produced by Mr. Pathak, learned Standing Counsel, Education Department, what has transpired is that, at the eve of order of promotion, both the petitioner and the Respondent No.3 made representations for their continuation at Guwahati after promotion. The Respondent No.3 submitted representation through his wife on 12.3.2005 and on the body of the such representation, the Chief Minister of the State and Minister of Health & Family Welfare, Higher, Technical and Adult Education made endorsement for posting of the Respondent No.3 at Guwahati by their respective endorsements dated 15.3.2005 and 25.3.2005. On the other hand, the representation submitted on 30.3.2005 was not favoured with any such endorsement. However, the Joint Secretary of the department gave an endorsement to process the same in the file. It will be pertinent to mention here that while the wife of the Respondent No.3 made representation directly to the Chief Minister of the State, the petitioner made representation to the departmental authority namely, the Commissioner & Special Secretary, Education (CTM) Department.

9. Based on the aforesaid representation of the Respondent No.3, the note in the file was put up with the observation that the Chief Minister of the State has ordered to post the Respondent No.3 in Assam Engineering Institute, Guwahati. On the other hand, so far as the petitioner is concerned, the note simply mentioned about her representation. It is on that basis, the posting of the Respondent No.3 at Guwahati, upon his promotion as Head of the Department was materialized.

10. In the order dated 7th January, 2006, by which the representation of the petitioner has been disposed of by the Commissioner & Secretary to the Government of Assam in the Department, there is no mention about the above aspect of the matter. Both in the affidavit-in-opposition as well as in the said order dated 7.1.2006, various other aspects have been mentioned including the need for posting of the petitioner at Jorhat on the basis of the ratio of woman teachers vis- -vis the girl students. However, while ordering posting on promotion by the office note, no such things had been mentioned. It was solely on the basis of the desire of the Chief Minister of the State with note of the Minister of Health & Family Welfare, Higher, Technical and Adult Education asking the Commissioner & Secretary, Higher Education to follow necessary action in due time, the Respondent No.3 was favoured with the posting at Guwahati. On the other hand, although the representation of the petitioner was to be processed in the file as per the note of the Joint Secretary, it appears that the same was never processed.

11. In the representation made by the wife of the Respondent No.3, the ground for posting of her husband at Guwahati was the difficulties they would face in looking after the family in absence of her husband. On the other hand, in the representation made by the petitioner, the ground urged for retaining her at Guwahati were her mother's illness (Chronic Renal Failure), schooling of her son and the decision of the State Government to post the spouse together in the same place of posting as far as practicable. It was stated in the representation that her husband was also working as a Lecturer in the same institute.

12. The records do not reflect as to how the case of the petitioner was considered, but the same reflects as to how the representation made by the wife of the Respondents No.3 was considered, about which mention has been made above. As per the guidelines for the transfer of Government employees issued vide office memorandum No.ABP.40/91/117 dated 19.9.1992 (Refer Hand Book of General Circulars, Govt. of Assam) representations/requests written or verbal for transfer and posting etc. received through other than normal channel will not be taken into cognizance and will be summarily rejected. In the instant case, such guideline has been violated by entertaining the representation made by the wife of the Respondent No.3 directly to the Chief Minister. Further, the wife could not have made

the representation pertaining to service condition of her husband.

13. In the case of Tarlochan Dev Sharma v. State of Punjab and others, reported in (2001) 6 SCC 260, the Apex Court emphasized need for independent exercise of power and jurisdiction by the officers vested with the same unmindful of any ministerial interference. In this connection, the observation of the Apex Court in paragraph 17 is quoted below :-

16. In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja (1995) 5 SCC 302 this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether.

14. The Commissioner & Secretary could not have cancelled the promotion of the petitioner by the order dated 19.8.2006 (Annexure-VIII to Misc. Case No.3381/2006). By the time the order was passed the petitioner was already protected by an interim order of this Court. Accordingly, the said order is set aside and quashed. The order dated 7th January, 2006, by which the representation of the petitioner has been disposed of, is also not sustainable in law as the same does not deal with the real and sole aspect of the matter about which mention has been made above.

15. The impugned order will have to be understood by the reasons mentioned in the relevant document/file and cannot be supplemented by fresh reasons in the shape of affidavits and/or otherwise. It has been observed by the Apex Court in Mohinder Singh Gill v. Chief Election Commissioner reported in (1978) 1 SCC 504 :-

The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji (AIR 1952 SC 16) :

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.

16. As per the policy guidelines of the State Government, the husband and the wife are required to be posted at the same place of posting, as far as practicable. In the matter of transfer and posting, the ministerial interference, without any justification, is totally uncalled for. In the instant case, the Respondent No.3 was favoured with the posting at Guwahati on the basis of a request of his wife. Such request was made solely on the ground of her difficulties that she would face in case of transfer of her husband. While considering such request, the request made by the petitioner on the grounds mentioned above, was not

at all considered. While disposing of her representation as per the order of this Court, various aspects of the matters, discussed above including the fact of ministerial interference in the matter have not been discussed.

17. All the above aspects of the matter are required to be considered by the Commissioner & Secretary to the Government of Assam in the Higher Education Department, who had earlier disposed of the representation in terms of the order passed by this Court. Accordingly, the matter is remanded back to the said authority once again for a decision in the matter consistently with the observations made above. If need be, both the petitioner as well as the Respondent No.3 should be given personal hearing. The matter shall be decided by a speaking order, which the Commissioner & Secretary shall pass as expeditiously as possible but at any rate not later than 31st August, 2007. Till then, status quo as on today, shall be maintained.

18. Writ petition is disposed of.